

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MAZY SEHRGOSHA, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

KINDRED HEALTHCARE, INC., PHYLLIS
R. YALE, BENJAMIN A. BREIER, JOEL
ACKERMAN, JONATHAN D. BLUM, PAUL
J. DIAZ, HEYWARD R. DONIGAN,
RICHARD GOODMAN, CHRISTOPHER T.
HJELM, FREDERICK J. KLEISNER,
SHARAD MANSUKANI, M.D., and LYNN
SIMON, M.D.,

Defendants.

C.A. No. 1:18-cv-0230-RGA

JOEL ROSENFELD, On Behalf of Himself
and All Others Similarly Situated,

Plaintiff,

vs.

KINDRED HEALTHCARE, INC., PHYLLIS
R. YALE, BENJAMIN A. BREIER, JOEL
ACKERMAN, JONATHAN D. BLUM, PAUL
J. DIAZ, HEYWARD R. DONIGAN,
RICHARD GOODMAN, CHRISTOPHER T.
HJELM, FREDERICK J. KLEISNER,
SHARAD MANSUKANI, M.D., and LYNN
SIMON, M.D.,

Defendants.

C.A. No. 1:18-cv-0260-RGA

GEORGE W. EINHORN,

Plaintiff,

vs.

KINDRED HEALTHCARE, INC., PHYLLIS
R. YALE, BENJAMIN A. BREIER, JOEL
ACKERMAN, JONATHAN D. BLUM, PAUL
J. DIAZ, HEYWARD R. DONIGAN,
RICHARD GOODMAN, CHRISTOPHER T.
HJELM, FRED J. KLEISNER, SHARAD
MANSUKANI, M.D., and LYNN SIMON,

Defendants.

C.A. No. 1:18-cv-0297-RGA

THE ETBR PLAINTIFFS' RESPONSE TO DEFENDANTS' SUBMISSION

In Defendants' submission in response to Plaintiffs' response to the Court's Order dated September 5, 2018, Defendants agreed with Plaintiffs that 14¹ out of the 29 cases listed in Plaintiffs' Response concerned transactions where defendant corporations appear not to have made corrective disclosures, but disagreed with Plaintiffs' assessment of 15 of those 29 cases. *See* The ETBR Plaintiffs' Response to the Order Dated September 5, 2018, Dkt. No. 16 (Sept. 19, 2018); Defendants' Response to Order Dated November 26, 2018, Dkt. No. 19, at 3-4 (Dec. 10, 2018) ("Defendants' Dec. 10, 2018 Response"). This response concerns some of those 15 cases.²

In DigitalGlobe, Inc., the company filed Amendment 1 to the Form F-4 dated June 2, 2017. However, plaintiff continued to pursue the litigation by filing a motion for preliminary

¹ These cases involved Almost Family, Inc.; Columbia Pipeline Group, Inc.; Lionbridge Technologies, Inc.; Mavenir Inc.; Northern Tier Energy LP; BioCryst Pharmaceuticals, Inc.; Bonanza Creek Energy, Inc.; Forester Group, Inc.; Albany Molecular Research Inc.; Energy XXI Gulf Coast, Inc.; Juniper Pharmaceuticals, Inc.; Nuestar Inc.; Orbotech Ltd.; and USG Corporation.

² As indicated in Plaintiffs' response, Plaintiffs reviewed the SEC filings related to 98 transactions. Regrettably, Plaintiffs mistakenly included some transactions in the non-mooted group where, in fact, mooted disclosures had been made.

injunction on June 5, 2017, and particularly stated that the “Amended Registration Statement did not address the disclosure violations which are the basis for this Preliminary Injunction Motion.” *Zand v. DigitalGlobe, Inc. et al.*, 1:17-cv-00592-RGA, Dkt. No. 4, at 1 n.1 (D. Del. June 5, 2017). The action was transferred to the District of Colorado on June 27, 2017, as it related to four actions that were pending in the District of Colorado. The plaintiffs’ motions for preliminary injunction were denied and plaintiffs voluntarily dismissed the actions without the sought after disclosures being made. *See Assad v. DigitalGlobe, Inc.*, 17-cv-01097-PAB-NYW, Dkt. No. 27 (D. Del. July 21, 2017); Dkt. No. 28 (Sept. 20, 2017).

In Energy Transfer Partners, L.P., the company filed five amendments to its Form S-4 dated December 20, 2016, with the last amendment dated March 22, 2017 under a Form S-4/A, and filed with the Securities and Exchange Commission (“SEC”) on March 24, 2017. However, after the last amendment was filed, the plaintiffs filed an amended complaint and a second amended complaint on July 31, 2017 and August 21, 2017, respectively, in which they continued to allege that the amended Form S-4/A was false and misleading, in violation of Sections 14(a) and 20(a) of the Securities Exchange Act 1934. *See Shure v. Energy Transfer Partners, L.P. et al.*, 1:17-cv-00044-CCC, Dkt. Nos. 12, 14 (D. Del. July 31, 2017, and Aug. 21, 2017).

In IXYS Corporation, on February 12, 2018, the plaintiff voluntarily dismissed the action after some supplemental disclosures were made in the definitive proxy statement on Schedule 14A dated December 13, 2017. *See Franchi v. IXYS Corporation*, 1:17-cv-01592-MEM, Dkt. No. 3 (D. Del. Feb. 12, 2018). However, in a related consolidated action in the Northern District of California, the lead plaintiff filed an amended complaint alleging that the definitive proxy statement continued to be “materially incomplete and misleading.” *Sanchez v. IXYS Corp.*, 3:17-cv-06441-WHO, Dkt. No. 42 (N.D. Cal. Apr. 11, 2018).

In U.S. Geothermal Inc., on May 15, 2018, plaintiff voluntarily dismissed the federal action after some supplemental disclosures were made. *See Weinstock v. U.S. Geothermal Inc.*, 1:18-cv-00371-VAC-CJB, Dkt. No. 4 (D. Del. May 15, 2018). However, in a breach of fiduciary duty case filed in the Delaware Chancery Court, the plaintiff alleged, in a verified amended class action complaint, that the definitive proxy statement on a Schedule 14A filed with the SEC dated March 20, 2018 was “materially incomplete and misleading.” *Riche v. Pappas*, C.A. No. 2018-0177-JTL, (Del. Ch. June 1, 2018). The Court denied defendants’ motion to dismiss and the action is proceeding with discovery.

In A. Schulman, Inc., the company appears to have made some supplemental disclosures in its Schedule 14A, dated May 11, 2018 as identified in Annex A of Defendants’ Dec. 10, 2018 Response. However, based on Plaintiffs’ review of that proxy, the company continued not to disclose certain material information alleged in the complaint, including key line items related to earnings before interest, taxes, depreciation and amortization (“EBITDA”); earnings before interest and taxes (“EBIT”); net operating profit after tax; and unlevered free cash flow. *See Barmack v. A. Schulman, Inc. et al.*, 1:18-cv-00639-LPS, Complaint For Violation of the Federal Securities Laws, Dkt. No. 1 (D. Del. Apr. 26, 2018), ¶¶ 26-29.

In Stone Energy Corporation, the company appears to have made some supplemental disclosures in its Form S-4 Amendment No. 2, dated March 15, 2018, as identified in Annex A of Defendants’ Dec. 10, 2018 Response. However, based on Plaintiffs’ review of that proxy, the company continued not to disclose certain material information for both the company and the buyer, as alleged in the complaint, including key line items related to EBITDA; free cash flow from operations and changes in working capital; and key inputs and assumptions used in the financial advisor’s financial analyses. *Heinrich v. Stone Energy Corp. et al.*, Complaint, Dkt. No. 1 (D. Del. Jan. 4, 2018), ¶¶ 41-43, 49, 51-54.

In Supervalu, Inc., supplemental disclosures were made, but they were made in a Form 8-K filed with the SEC on October 9, 2018, twenty days after Plaintiffs filed their response to the Court's Order. *See Gusinsky Rev. Trust v. Supervalu Inc.*, 1:18-cv-01323-MN (D. Del.) (In the Form 8-K, the company acknowledged that the supplemental disclosures were filed to, among other things, "moot plaintiffs' disclosure claims.").

Dated: December 21, 2018

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